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SUPREME COURT OF THE UNITED STATES

APR 30 1942

CHARLES ELMORE COBLEY
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OCTOBER TERM, 1941

Nos. 1199 and 1200

HEILIG BROTHERS CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

**PETITION BY HEILIG BROTHERS CO. FOR WRITS
OF CERTIORARI TO THE UNITED STATES DIS-
TRICT COURT FOR THE MIDDLE DISTRICT OF
PENNSYLVANIA AND TO THE UNITED STATES
CIRCUIT COURT FOR THE THIRD CIRCUIT.**

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HEILIG BROTHERS CO.,

Petitioner,
vs.

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ON PETITION BY HEILIG BROTHERS CO. FOR
WRIT OF CERTIORARI DIRECTED TO THE
UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA.

ON PETITION BY HEILIG BROTHERS CO. FOR
WRIT OF CERTIORARI DIRECTED TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT.

*To the Honorable Harlan Fiske Stone, Chief Justice, and
to the Honorable Associate Justices of the Supreme Court
of the United States:*

Your petitioner hereby prays for a writ of certiorari directed to the United States District Court for the Middle District of Pennsylvania, to review a decree rendered by

that Court on the 10th day of December, 1941, wherein the Court in said decision dismissed a petition for review of an order of the National Labor Relations Board, said petition for review having been filed on August 9, 1941, and in which the National Labor Relations Board was named as respondent. All proceedings before the United States District Court for the Middle District of Pennsylvania are set forth in the appendix A following the brief.

Your petitioner further prays for a writ of certiorari directed to the United States Circuit Court of Appeals for the Third Circuit to review a decree of that Court entered on the 2nd day of January, 1942 (petition for rehearing denied January 31, 1942), by which decree the Circuit Court of Appeals granted a petition of the National Labor Relations Board for enforcement of its order requiring petitioner to offer reinstatement to approximately sixty-five (65) striking employees, and to make said employees whole for loss of wages, in the event of failure to rehire them, etc., and further requiring petitioner to cease and desist from certain labor practices asserted to be prohibited by the National Labor Relations Act. (Act of July 5, 1935; 49 Stat. 449, Chap. 372; 29 U. S. C. A. sec. 151-166.) A copy of the order is set forth in full in the appendix of the brief filed herein.

I.

Summary and Statement of the Matter Involved.

Several major questions are presented to this Court for its consideration. (1) whether the constitutional rights of the petitioner are not grossly prejudiced by the failure of the District Court to entertain the petitioner's petition for review even though the National Labor Relations Act (Act of July 5, 1935; 49 Stat. 449, Chap. 372; 29 U. S. C. A. sec. 151-166), does not specifically confer reviewing power upon a United States District Court. (2) whether the Circuit

Court erred in refusing to stay the proceedings before it until such time as there has been a final determination of the matters before the United States District Court. (3) whether the Circuit Court may in its discretion refuse a rehearing to petitioner because said Court has decided the matter in issue prior to a decision by this Honorable Court, which said decision has an important bearing with relation to the present case, more specifically referring to the decision rendered by this Court in the case of *National Labor Relations Board v. Virginia Electric and Power Company*, 86 L. Ed., Adv. p. 306. (4) whether the respondent Board has authority under the Act to order petitioner to reinstate said persons in the absence of evidence and findings of fact, that such persons had not obtained regular and substantially equivalent employment elsewhere, based upon the date of the issuance of respondent's order.

Petitioner is engaged in the manufacture of wire screen cloth. It has previously been stipulated that because of the nature of petitioner's business, petitioner is engaged in interstate commerce within the meaning of the Act.

The National Labor Relations Board through its Fourth Regional Office issued its complaint against petitioner on April 17, 1940. A formal hearing was held opening on May 7, 1940 and continuing through May 16, 1940. Thereafter on June 12, 1940 an order was issued transferring the case to the Board and directing that no intermediate report be issued by the Trial Examiner. On December 18, 1940, the Board issued its proposed findings of fact, conclusions of law and order. By the terms of the proposed findings of fact, conclusions of law and order, the petitioner was found to have committed certain labor practices alleged to be unfair and which were based upon Sec. 8 (1), (3) and (5) of the National Labor Relations Act. On February 4, 1941, oral argument was had before the Board in Washington and thereafter on June 10, 1941, the Board issued its

findings of fact, conclusions of law and order. Charges under Sec. 8, (3) were dismissed. However, the Board charged the company with having committed certain practices in violation of Sec. 8, (1) and (5).

The company through its agents and attorney, on August 9, 1941, duly filed a petition for review of the final order of the Board in the United States District Court for the Middle District of Pennsylvania. Thereafter, on or about September 6, 1941, the Board filed a motion to dismiss the petition hereinbefore referred to for lack of jurisdiction. Petitioner herein filed an answer to the Board's motion to dismiss on September 11, 1941, and a hearing was held before Judge Johnson on the 22nd day of October, 1941 in Scranton, Pennsylvania.

On or about the 7th day of October, 1941, the Board filed a petition for enforcement of its order with the United States Circuit Court of Appeals for the Third Circuit. Shortly thereafter, petitioner again petitioned the Circuit Court for a stay of the proceedings which would naturally arise as a result of the Board filing its petition for enforcement. The petition stated in substance that it was deemed desirable for the Circuit Court to withhold taking any action on the petition for enforcement of the Board's order until the matters in issue with the United States District Court had been determined. On October 20, 1941, argument was heard by the Honorable Judges of the Circuit Court of Appeals on the petition filed by the company asking for a stay, and on October 21, 1941, an order was entered denying the relief asked for. Inasmuch as argument on the proceedings before the District Court was scheduled for October 22, it does not appear that any harm would have resulted had the Circuit Court granted petitioner's request for a stay, pending determination of the District Court matter, and it is petitioner's contention that the Circuit Court erred in refusing to grant the stay, and by so

doing there arose prejudicial error on the part of the Circuit Court. Thereafter, and in view of the fact that the Circuit Court had refused to stay the Board's petition for enforcement, your petitioner herein filed an answer to the Board's petition for enforcement, on October 25, 1941. Oral argument before the Circuit Court was subsequently scheduled for December 17, 1941, and on January 2, 1942, the Circuit Court of Appeals entered its opinion in which it held that an order be entered ordering enforcement of the Board's order.

Thereafter, your petitioner herein applied to the Honorable Judges of the Circuit Court of Appeals for the Third Circuit for a rehearing and based the grounds for its petition on a decision rendered by this Honorable Court in the case of *National Labor Relations Board v. Virginia Electric and Power Company*, 86 L. Ed., Adv. p. 306, which said decision had not been brought to the attention of the Circuit Court by petitioner herein by virtue of the fact that this Honorable Court did not render its decision in the case hereinbefore referred to until after the Circuit Court of Appeals had heard argument of the Board's petition for enforcement. The petition for rehearing was summarily denied on January 31, 1942.

The petitioner alleges that the facts, matters and circumstances in its case are synonymous with the facts, matters and circumstances in the case of the Virginia Electric and Power Company. A copy of the company's petition for a rehearing, filed in the United States Circuit Court of Appeals for the Third Circuit is made a part of the appendix following the brief herein.

While the petitioner realizes that it is discretionary with the Circuit Court of Appeals to grant or to refuse a rehearing, nevertheless, it is petitioner's contention that the said Circuit Court may not overlook a new decision rendered by this Honorable Court particularly when said

decision affects the matter in issue, and that said failure to consider the decision of this Honorable Court in the aforesaid case was prejudicial error on the part of the Circuit Court.

II.

Reasons Relied On for Allowance of the Writ.

A. The first question presented in this case is whether the constitutional rights of the petitioner are not grossly prejudiced by the failure of the United States District Court for the Middle District of Pennsylvania to entertain its petition for review even though the National Labor Relations Act (Act of July 5, 1935; 49 Stat. 449, Chap. 372; 29 U. S. C. A., Sec. 151-166), does not specifically confer such reviewing power upon the District Court.

Sec. 10 E of the National Labor Relations Act provides that:

“The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States • • • within any circuit or district • • • wherein the unfair labor practice in question occurred or wherein such person resides or transacts business • • • for appropriate temporary relief or restraining order, • • •”

“The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended U. S. C., title 28, secs. 346 and 347.”

Sec. 10 G of the National Labor Relations Act provides that:

"The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

Theoretically, if the National Labor Relations Board decided to enforce an order and the circuit court of appeals for its district and the court of appeals for the District of Columbia were in vacation, the Board would thereupon proceed to enforce its order in a district court. The company against whom it was proceeding would have only the right to petition the Circuit Court of Appeals for its district or the Circuit Court of Appeals for the District of Columbia, and if such petition for review was filed during vacation periods of either the circuit court for its district or the Court of Appeals for the District of Columbia, irreparable damage might be done to the company charged with the unfair labor practice by virtue of the proceedings on the part of the Board in the District Court.

Your petitioner therefore contends that in the case in issue, it was necessary to petition for review at the earliest possible opportunity and that thereupon it was presented to the United States District Court, inasmuch as the Circuit Court of Appeals for the Third Circuit and the Court of Appeals for the District of Columbia were then in vacation.

B. The second question presented herein is whether the United States Circuit Court of Appeals can ignore proceedings on a constitutional question in the same case where such proceedings have been started in a United States District Court, even assuming for the purpose of argument

that a United States District Court is a lower court. To the best of petitioner's knowledge, the point raised in the United States District Court on the constitutional question therein involved has never been decided by this Honorable Court in connection with a National Labor Relations Board case, and even though facts and statements in support of it were offered during argument held on petitioner's request for a stay on Board's petition for enforcement, the Circuit Court judges refused to grant the relief requested, and thereby prejudiced the rights of petitioner herein.

C. The third question presented herein is whether a Circuit Court of Appeals can refuse without any reason, to grant a rehearing to the petitioner herein when the subject matter of the petition for rehearing is based entirely upon new matter, to wit, the decision rendered in the *Virginia Electric and Power Company* case, which said case was not decided by this Honorable Court until after the petitioner herein had argued its case before the Circuit Court of Appeals, and it further appearing that petitioner had not had the opportunity to bring to the attention of the Court the significant aspects established by the decision in the *Virginia Electric and Power Company* case, which case is in many respects, analogous to the case at bar.

The Circuit Court's refusal to grant a rehearing had prejudiced the rights of the petitioner and is prejudicial error on the part of said Circuit Court.

D. The fourth question presented herein as to the construction of that portion of the National Labor Relations Act which permits the Board to order reinstatement of striking employees.

Sec. 10 C., in view of Sec. 2 (3) by which the word "employee" is defined to include persons who have terminated their employment because of a labor dispute, and

have not obtained other "regular and substantially equivalent employment".

In a case wherein an employee has ceased working because of a labor dispute, and taking into consideration the foregoing paragraph, certain questions have arisen in this case, namely;

(1) Whether there must be a finding of fact supported by evidence that the persons ordered to be reinstated have not prior to the date of the order obtained other "regular and substantially equivalent employment".

(2) Is it within the power of the Board to order reinstatement of named individuals without provision that persons so named secure such other equivalent employment prior to an offer of reinstatement.

The practical importance in the administration of the National Labor Relations Act of authoritative answer to these questions is apparent.

Wherefore Your Petitioner Prays, that a writ of certiorari issue under the seal of this Honorable Court, directed to the United States District Court for the Middle District of Pennsylvania to the end that the proceedings of that Court in this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States, and that the judgment of the said United States District Court for the Middle District of Pennsylvania be reversed.

And Your Petitioner Further Prays, that a writ of certiorari issue under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Third Circuit to the end that the proceedings of that Court in this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of

the United States and that the judgment of the said Circuit Court of Appeals be reversed.

And For Such Further Relief as this Honorable Court may deem proper.

Respectfully submitted,

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Of Counsel for Petitioner.

